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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/649,825	08/28/2003	Jack William Maegli	4039-0135P	6651

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EXAMINER
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MAHAFKEY, KELLY JO

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 12/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)	
	10/649,825	MAEGLI ET AL.	
	Examiner	Art Unit	
	Kelly Mahafkey	1761	

– The MAILING DATE of this communication appears on the cover sheet with the correspondence address –  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above claim(s) 12-16 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)               | Paper No(s)/Mail Date. ____   |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>10/1/03 &amp; 4/19/04</u>   | 6) <input type="checkbox"/> Other: ____                                     |

***Election/Restrictions***

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
  - I. Claims 1-11, drawn to a shelf stable product, classified in class 426, subclass 573.
  - II. Claims 12-16, drawn to a method of making a shelf stable product, classified in class 426, subclass 613.

The inventions are distinct, each from the other because:

2. Inventions II and I are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case the product can be made with a different process (i.e. shredding or grinding is not required to make the product of group I).
3. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter, restriction for examination purposes as indicated is proper.
4. During a telephone conversation with Richard Gallagher on December 5, 2005 a provisional election was made with traverse to prosecute the invention of group 1, claims 1-11. Affirmation of this election must be made by applicant in replying to this Office action. Claims 12-16 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 1 and 2 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Dally et al. (US 6299916 B1).

7. Dally et al (Dally) discloses of a shelf stable bar with a crust and filling. Dally discloses that that filling has a water activity of 0.6-0.90. Dally discloses composition includes a protein, a plasticizer comprising a polyol and a non-polyol plasticizer, an edible oil, and a flavoring component. Refer specifically to Abstract, Column 2 All, Column 3 paragraphs 1-3, and Example 1.

***Claim Rejections - 35 USC § 103***

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

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1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

10. Claims 1-6 and 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gamay et al. (US 5935634).

11. Regarding claims 1-4, Gamay discloses of a shelf stable cheese. Specifically regarding claim 1, Gamay discloses that the cheese consists of 22.10% casein (protein), 2-15% of glycerin (polyol plasticizer), 2-15% lactates (non-polyol plasticizer), including sodium lactate, 22.78% partially hydrogenated vegetable oil, and flavoring in a type and a level to suit the desired taste. Refer specifically to Column 5 lines 39-57, Column 6 lines 40-43 and 53-58, and Examples 3, 4, 7, and 8. Specifically regarding the water activity as recited in claims 1-4, Gamay et al. (Gamay) discloses of a shelf stable cheese with a water activity of 0.86 (Column 4 lines 47-50). Gamay teaches that there is a need for cheese products/compositions to include a low-water activity in order to satisfy safety measures in regards to shelf stability (Column 3 lines 12-20). Gamay also teaches that the water activity can be lowered through the addition of glycerol, salt, and sodium lactate (Column 2 lines 53-58). Gamay however is silent to the range of water activity below 0.86 to which his invention is intended to encompass. It would have been obvious to one skilled in the art at the time the invention was made to include lower water activity levels in order to safely obtain longer shelf stability in view of Gamay. One would have been motivated to include a lower water activity level depending on the desired shelf stability of the product.

12. Regarding claims 5 and 6, Gamay discloses that the cheese consists of 22.10% casein (protein), 2-15% of glycerin (polyol plasticizer), 2-15% lactates (non-polyol plasticizer), including sodium lactate, 22.78% partially hydrogenated vegetable oil, and flavoring (such as cheese) in type and a level to suit the desired taste. Refer specifically to Column 5 lines 39-57, Column 6 lines 40-43 and 53-58, and Examples 3, 4, 7, and 8. Gamay, however, is silent to the moisture content as low as 5-25% as recited in claim 5. It would have been obvious to one skilled in the art at the time the invention was made to have included any particular moisture content depending on the desired consistency of the final product.

13. Regarding claims 8 and 9, Gamay discloses that the cheese consists of about 18% casein (protein), about 20% of glycerin (polyol plasticizer), 2-15% lactates (non-polyol plasticizer), including sodium lactate, about 18% (lower than 23%) vegetable shortening (stabilized animal fat), and flavoring in type and a level to suit the desired taste. Refer specifically to Column 5 lines 20-25 and 39-57, Column 6 lines 40-43 and 53-58, and Examples 1, 3, 4, 7, and 8. Gamay is silent to the addition of meat flavoring. It would have been obvious, however, to include any desirable flavoring in any amount, such as meat flavoring, depending on the desired taste in view of Gamay (Column 6 lines 40-43).

14. Regarding claim 10, Gamay discloses that the cheese consists of 22.10% casein (protein), 2-15% of glycerin (polyol plasticizer), 2-15% lactates (non-polyol plasticizer), including mono saccharides, 22.78% partially hydrogenated vegetable oil, and flavoring (such as cheese) in type and a level to suit the desired taste. Refer specifically to

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Column 4 lines 54-57, Column 5 lines 39-57, Column 6 lines 40-43 and 53-58, and Examples 3, 4, 7, and 8. Gamay is silent to the addition of vegetable flavoring. It would have been obvious, however, to include any desirable flavoring in any amount, such as vegetable flavoring, depending on the desired taste in view of Gamay (Column 6 lines 40-43).

15. Claims 7 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gamay et al. (US 5935634) as applied to claims 1-6 and 8-10 above, and further in view of Rule et al. (US 4232050).

16. Regarding claim 7, Gamay discloses that the cheese consists of about 18% casein (protein), about 18% glycerin (polyol plasticizer), 2-15% lactates (non-polyol plasticizer), including sodium lactate, about 21% partially hydrogenated vegetable oil, and flavoring (such as cheese) in type and a level to suit the desired taste. Refer specifically to Column 5 lines 39-57, Column 6 lines 40-43 and 53-58, and Examples 3, 4, 7, and 8. Gamay is silent to soybean oil and 24% of a cheese component. Rule et al. (Rule) discloses that soybean oil is preferred in cheese/imitation cheese production because of its bland flavor and Wiley melting point (Column 7 lines 12-18). Regarding the use of soybean oil, it would have been obvious to one skilled in the art at the time the invention was made to include soybean oil in view of Rule as the hydrogenated vegetable oil as disclosed by Gamay. One would have been motivated to do so in order to take advantage of the benefits of soybean oil, such as its bland flavor and Wiley melting point. Because both deal with cheese or cheese analogs one would have a

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reasonable expectation of success from the combination. Regarding a cheese component, it would have been obvious to one skilled in the art at the time the invention was made to include any amount of a cheese component depending on the desired amount of cheese flavoring in view of Gamay (Column 6 lines 40-43).

17. Regarding claim 11, Gamay discloses that the cheese consists of about 20% casein (protein), about 17% of glycerin (polyol plasticizer), 2-15% lactates (non-polyol plasticizer), including sodium lactate, about 20% hydrogenated vegetable oil, about 8% salt, and flavoring in type and a level to suit the desired taste. Refer specifically to Column 5 lines 39-57, Column 6 lines 40-43 and 53-58, and Examples 1, 3, 4, 7, and 8. Gamay is silent to the addition of 35% flavoring of a vegetable component and soybean oil. Rule et al. (Rule) discloses that soybean oil is preferred in cheese/imitation cheese production because of its bland flavor and Wiley melting point (Column 7 lines 12-18). Regarding the use of soybean oil, it would have been obvious to one skilled in the art at the time the invention was made to include soybean oil in view of Rule as the hydrogenated vegetable oil as disclosed by Gamay. One would have been motivated to do so in order to take advantage of the benefits of soybean oil, such as its bland flavor and Wiley melting point. Because both deal with cheese or cheese analogs one would have a reasonable expectation of success from the combination. Regarding the addition of 35% flavoring of a vegetable component, it would have been obvious, however, to include any desirable flavoring in any amount, such as vegetable flavoring, depending on the desired taste in view of Gamay (Column 6 lines 40-43).



**Conclusion**

18. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure:
19. US 3851083 discloses of a stable ingredient which consists of protein, polyol and non-polyol plasticizers, oil, and flavorings.
20. US 4721622 discloses of a pastry filling with a water activity of 0.2.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



12/12/05

Kelly Mahafkey  
Examiner  
Art Unit 1761